BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HELEN CUSHENBERY	)	
Claimant	)	
VS.	)	
	)	Docket No. 199,674
WAL-MART	)	
Respondent	)	
AND	)	
	)	
NATIONAL UNION FIRE INS. CO. NY	)	
Insurance Carrier	)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Jon L. Frobrish on August 8, 1996. The Appeals Board heard oral argument on February 12, 1997.

APPEARANCES

Dennis L. Phelps of Wichita, Kansas, appeared on behalf of the claimant. Michael D. Streit of Wichita, Kansas, appeared on behalf of the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has adopted stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded benefits based upon a 15 percent permanent partial functional impairment. The Administrative Law Judge did so after finding that the rationale of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995) was applicable to the facts of this case. The Administrative Law Judge rejected claimant's contention that she was entitled to benefits based upon a work disability. Claimant disputes this finding. The nature and extent of claimant's disability is the sole issue argued on appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that claimant would be entitled to benefits based upon 15 percent functional impairment from the date of accident, December 17, 1993, through the last date claimant worked for the respondent, April 1, 1996, and would be entitled to a work disability of 67.5 percent thereafter.

At the time of claimant's December 17, 1993 accident, claimant had worked for respondent for approximately 13 years as a shoe department worker. She stocked shoes, waited on customers, and loaded and unloaded shoes from boxes. On December 17, 1993 she fell while coming down a ladder; she injured her left foot and back. She continued to work for approximately six weeks while receiving treatment from a chiropractor. Ultimately she was referred to Dr. Charles D. Pence, an orthopedic specialist, and was taken off work and received temporary total disability payments for a period of 65 weeks from January 26, 1994 through May 30, 1995.

Claimant also received authorized medical care from Dr. Paul S. Stein, a neurosurgeon, and Dr. Stephen Ozanne, an orthopedic surgeon. Dr. Ozanne performed a two level laminectomy and fusion at L4-5 and L5-S1 on October 27, 1994. Claimant was released from care as of May 20, 1995.

Beginning in May 1995, respondent offered and claimant attempted several types of work. Claimant worked first in a customer service position in the shoe department. Because of symptoms from standing on hard floors, claimant returned to Dr. Ozanne. When respondent received additional recommendations by Dr. Ozanne, respondent changed claimant's job to one as a freight processor, also in the shoe department. This second position again involved some standing and irritated claimant's back. Claimant continued to attempt to perform this work for nearly four months and, according to her department manager, worked harder than the other processors. Because of the ongoing problems, the respondent again moved claimant, this time to a position in the fitting room. This fitting room job involved answering the telephone and making pages over the public address system. Because of longstanding hearing problems, claimant was unable to perform the job. Finally, the respondent placed claimant in a position as an exit door

greeter. Respondent allowed claimant to perform the duties of an exit door greeter while seated. When the walk to and from the back of the store to clock in caused claimant problems, respondent allowed claimant to report her time on a weekly basis. While performing duties as an exit greeter near the opening and closing doors, claimant contracted bronchitis. She was placed on medical leave the first of April 1996.

The Administrative Law Judge concluded that claimant's award should be limited to the functional impairment on the basis of the principles stated in the Foulk decision. The Court there stated that when a claimant refuses to attempt an offered position which is within his/her capabilities, the claimant is not entitled to work disability. The Appeals Board considers the circumstances here materially different from those addressed in the Foulk decision. Here claimant attempted several jobs. From our review of the record it appeared both claimant and respondent made a good faith effort to return claimant to gainful employment. For reasons outside the control of either party, those efforts were not successful. The Foulk decision does not apply.

Claimant is entitled to benefits based upon definitions of work disability stated in K.S.A. 1996 Supp. 44-510e:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

The difference between claimant's average weekly wage before and after the injury is 100 percent. The only evidence of task loss, supported by the opinion of the physician, is the testimony of Dr. Ozanne who agreed with the opinion of Mr. Jerry Hardin that claimant had lost the ability to perform 35 percent of the tasks she had performed in the 15-year work history preceding the date of accident. When the actual wage earning loss of 100 percent and the task loss of the 35 percent are averaged together, as required by statute, the result is a 67.5 percent work disability. The Appeals Board finds and concludes that claimant is entitled to benefits based upon a 67.5 percent work disability.

Claimant argues that she should be entitled not only to work disability but that she is permanently and totally disabled. The Appeals Board disagrees. Dr. Ozanne, one of the treating physicians, rated claimant's permanent partial impairments at 15 percent impairment to the body as a whole. He assigned permanent work restrictions which limited claimant to a light or sedentary category of work with only occasional lifting of 10 pounds, limited bending or twisting, overhead work, and limited climbing. Dr. Ozanne also agreed with the recommendation by Dr. Jane K. Drazek that claimant not engage in activities which would require prolonged sitting, standing, ambulation, or repetitive bending activities.

Dr. Drazek, who performed an independent medical examination at the request of the Administrative Law Judge, also rated claimant's impairment as a 15 percent impairment to the body as a whole. She recommended claimant not engage in work involving prolonged standing or walking, ambulation on hard services, bending and lifting greater than 20 pounds or more on an occasional basis or 10 pounds on a frequent basis. Dr. Drezek concludes that claimant could do sedentary work if she were allowed to change positions. While both Dr. Drazek and Dr. Ozanne express doubt about claimant's ability to obtain employment, the restrictions do not prevent her from some type of work.

The Appeals Board finds that claimant left her last accommodated position with respondent primarily for reasons other than her on-the-job injury. She contracted bronchitis. She testified that there were some other difficulties with the job but it appears clear that this unrelated subsequent occurrence, the bronchitis, is the primary reason she was unable to continue in that employment.

K.S.A. 444-510c(a)(2) describes permanent total disability as:

> "Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment." (Emphasis added.)

For these reasons the Appeals Board concludes that claimant should be awarded benefits based upon the 67.5 percent work disability and not a permanent total disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobrish dated August 8, 1996, should be, and is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Helen Cushenbery, and against respondent Wal-Mart, and its insurance carrier, National Union Fire Insurance Company of New York, for accidental injury sustained on December 17, 1993.

Claimant is entitled to 65 weeks of temporary total disability compensation at the rate of $176.70 per week or $11,485.50 followed by 246.38 weeks permanent partial disability at $176.70 per week or $43,535.35 for a 67.5 percent permanent partial general body disability, making a total award of $55,020.85.

As of March 31, 1997 there would be due and owing to the claimant 65 weeks of temporary total disability at the rate of $176.70 per week in the sum $11,485.50 plus 106.43 weeks at $176.70 per week or in the sum of $18,806.18 for a total due and owing of

$30,291.68 which is ordered paid in one lump sum less amounts previously paid. Thereafter the remaining balance in the amount of $24,729.17 shall be paid at $176.70 per week for 139.95 weeks or until further order of the Director.

The Appeals Board approves and adopts the orders by the Administrative Law Judge relating to unauthorized medical expense, future medical expenses, attorneys fees and expense of administration.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Phelps, Wichita, KS
Michael D. Streit, Wichita, KS
Jon L. Frobrish, Administrative Law Judge
Philip S. Harness, Director